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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FERNANDO GARCIA, Defendant and Appellant.	E072369 (Super.Ct.No. RIF1604169) OPINION

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge. Affirmed.

Erica Gambale, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Arlene A. Sevidal, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

In 2016, defendant and appellant, Fernando Garcia, entered a guilty plea, admitted several sentencing enhancements, and was sentenced to state prison. The court also imposed several fees and fines. Defendant has filed two prior appeals in this case, the first from his original 2016 judgment (*People v. Garcia* (E067607, May 8, 2018 [nonpub. opn.] (*Garcia I*)) and the second from his August 23, 2018 judgment, which was issued following remand in *Garcia I* (*People v. Garcia* (E071330, April 8, 2019) [nonpub. opn.] (*Garcia II*)).

In *Garcia II*, we affirmed defendant's August 23, 2018 judgment. In this appeal, defendant challenges the March 6, 2019 order of the trial court, denying his motion to conduct an ability to pay hearing in order to determine whether he was presently able to pay the fees and fines that the court imposed on August 23, 2018, as part of his subsequent judgment of conviction and sentence (*People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*)) (sometimes, the *Dueñas* motion).

Defendant filed his *Dueñas* motion in February 2019, shortly after *Dueñas* was decided in January 2019, and while his appeal from his August 23, 2018 judgment in *Garcia II* was pending. The trial court denied the *Dueñas* motion on the ground the court did not have jurisdiction to consider it, given that the appeal in *Garcia II* was pending and, therefore, Penal Code section 1237.2[1] did not apply.

[1] Undesignated statutory references are to the Penal Code.

Defendant claims his *Dueñas* motion was erroneously denied, because he was not required to pursue his claim of due process *Dueñas* error in *Garcia II*; therefore, the court had jurisdiction to consider the motion under section 1237.2. He also claims that his two prison priors, which he admitted as part of his 2016 plea (former § 667.5), and the two one-year terms, which were imposed on the prison priors as part of his August 23, 2018 judgment of conviction and sentence, must be stricken in light of Senate Bill No. 136 (2018-2019 Reg. Sess.). Senate Bill No. 136 amended section 667.5, effective January 1, 2020, to eliminate prison priors that are not based on a sexually violent offense.

We conclude that defendant's *Dueñas* motion was properly denied. As we explain, the court did not have jurisdiction to consider the motion under section 1237.2, given that defendant's appeal in *Garcia II* was pending. Under section 1237.2, defendant was required to pursue his claim of *Dueñas* error in *Garcia II*, but he did not do so. As we further explain, defendant is not entitled to the benefits of Senate Bill No. 136. His August 23, 2018 judgment of conviction and sentence was final on October 23, 2019, before Senate Bill No. 136 went into effect on January 1, 2020.

II. FACTS AND PROCEDURE

On August 23, 2016, defendant was involved in a traffic accident after which he became upset, jumped out of his car, pulled out a knife, and scratched up the other person's car. (*Garcia I*, at * 2.) The People charged defendant by felony complaint with felony vandalism (count 1; § 594, subd. (b)) and unlawfully challenging a person to fight in public, a misdemeanor (count 2; § 415, cl. (1)). (*Ibid*.) The People additionally alleged defendant had personally used a dangerous weapon, a knife, in his commission of

the count 1 offense (§§ 12022, subd. (b)(1), 1192.7, subd. (c)(23)), suffered prison priors (former § 667.5, subd. (b)), and two strike priors (§§ 667, subds. (c), (e)(2)(A), 1170.12, subd. (c)(2)(A)). (*Id*. at **2-3.)

On December 20, 2016, defendant pled guilty to both counts and admitted the truth of the personal use enhancement, both prison priors, and one of the two strike priors. On the same day, the court (Judge Hernandez) struck one of the two strike priors, defendant's 1994 conviction for forcible sodomy (§ 286, subd. (d)), in the interests of justice (§ 1385). (*Garcia I*, at *3.) Defendant was then sentenced to nine years in state prison: six years on count 1 (the upper term of three years, doubled to six years based on the strike prior), one year for the personal use enhancement, and two years (one year each) for the two prison priors.

In sentencing defendant on December 20, 2016, the court (Judge Hernandez) imposed several fines and fees: a $514.58 booking fee (Gov. Code § 29550); a $300 restitution fine (Pen. Code, § 1202.4, subd. (b)); a $300 parole revocation fine, stayed pending defendant's successful completion of parole (Pen. Code, § 1202.45, subd. (c)); a $60 criminal conviction fee, or court facilities assessment ($30 for each conviction) (Gov. Code, § 70373); and an $80 court security fee, or court operations assessment ($40 for each conviction) (Pen. Code, § 1465.8).[2]

[2] The court further ordered defendant to "forthwith" pay "any" victim restitution, and in his plea agreement defendant acknowledged that "the amount of victim restitution" was approximately $3,000.

In *Garcia I*, defendant appealed his December 20, 2016 judgment of conviction sentence, claiming the record showed that the court (Judge Hernandez) may have erroneously believed that it did not have discretion to strike the personal use enhancement. (*Garcia I*, at *2, 4-6.) We agreed, reversed the judgment, and remanded the matter for the court to determine whether to strike the personal use enhancement. (*Id*. at *4-6.) Our opinion in *Garcia I* was issued on May 8, 2018, and the remittitur was issued on July 10, 2018.

Following remand, on August 23, 2018, the court (Judge Molloy) imposed but stayed the one year term on the personal use enhancement but adopted all its other original sentencing choices, thus reducing defendant's sentence from nine years to eight years. (*Garcia II*, at ** 1-2, 4-5.) Defendant again appealed, and his appointed counsel filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, identifying one potentially arguable issue: whether the court erred in exercising its discretion on remand in again imposing but staying the one-year term on the personal use enhancement. (*Garcia II*, at *2.)

Defendant then filed a personal supplemental brief in *Garcia II*, challenging the underlying judgment of conviction. (*Garcia II*, at *2.) Defendant claimed that the strike prior he admitted—a 1993 conviction for assault with a firearm (§ 245, subd (a)(1))—was invalid and had to be stricken because he was never actually convicted of the offense, and he was only 15 years old when he committed it. (*Garcia II*, at **2, 5.) He also claimed the People misled him into admitting the 1994 strike prior. (*Id. at* *2.)

In *Garcia II*, we concluded that defendant had forfeited his claim that his 1993 strike prior was invalid and had to be stricken because he did not raise the claim at his original sentencing hearing on December 20, 2016, in *Garcia I*, or at his resentencing hearing on August 23, 2018, following remand in *Garcia I*. (*Garcia II*, at **5-6.) We also concluded that defendant did not demonstrate sufficient justification for his delay in raising the issue for the first time in *Garcia II*, and even if he did, any error was harmless because, if the 1993 strike prior were stricken, then the People could reinstate the 1994 strike prior "and use it in place of the invalid 1993 offense." (*Id*. at *6.) Thus, we concluded that defendant could not demonstrate reasonable probability that, but for the error, the result would have been different. (*Ibid*.) Lastly, we independently reviewed the record for other potential error and found no arguable issues. (*Id*. at *7.) Our opinion in *Garcia II* was issued on April 8, 2019, followed by the remittitur on July 25, 2019.

On February 20, 2019, before we issued our opinion in *Garcia II*, defendant filed his *Dueñas* motion in the trial court, purportedly under section 1237.2, asking the court to vacate the booking fee, the court facilities assessment, and the court operations assessments, and to stay the restitution fine and the parole revocation fine, imposed at his previous two sentencing hearings. (*Dueñas*, *supra*, 30 Cal.App.5th 1157.)[3]

[3] *Dueñas* held that "due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments . . . ." (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1164.) And, to avoid an unconstitutional interpretation of section 1202.4, *Dueñas* further held that a trial court must stay a restitution fine, "until and unless the People demonstrate that the defendant has the ability to pay the fine." (*Dueñas*, at pp. 1169-1172.) *Dueñas* was decided on January 8, 2019, while defendant's appeal in *Garcia II* was pending.

On March 6, 2019, the trial court denied defendant's *Dueñas* motion, without conducting an ability to pay hearing, on the ground that the court did not have jurisdiction to consider the motion. The court opined, however, that defendant could challenge the fees and fines by petitioning for a writ of habeas corpus.

III. DISCUSSION

A. *Defendant's* Dueñas *Motion Was Properly Denied on Jurisdictional Grounds*

Defendant claims the trial court erroneously denied his *Dueñas* motion, asking the court to conduct an ability to pay hearing on the previously-imposed fees and fines, on the ground the court lacked jurisdiction to consider the motion. We conclude that the motion was correctly denied because the court lacked jurisdiction to consider it.

Section 1237.2 was added to the Penal Code effective January 1, 2016 (Stats. 2015, ch. 104, § 3; see *People v. Jenkins* (2019) 40 Cal.App.5th 30, 37 (*Jenkins*)). The statute provides: "An appeal may *not be taken* by the defendant from a judgment of conviction on the ground of an error in the imposition or calculation of fines, penalty assessments, surcharges, fees, or costs unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction in the trial court, which may be made informally in writing. The trial court retains jurisdiction after a notice of appeal has been filed to correct any error in the imposition or calculation of fines, penalty assessments, surcharges, fees, or costs upon the defendant's request for correction. *This section only applies in cases where the erroneous imposition or calculation of fines, penalty*

assessments, surcharges, fees, or costs are the sole issue on appeal." (§ 1237.2, italics added.)

As our colleagues in Division One of this court recently explained, section 1237.2 is an exception to the general rule that an appeal from an order or judgment in a criminal case removes the subject matter of the order or judgment from the jurisdiction of the trial court. (*Jenkins*, *supra*, 40 Cal.App.5th at p. 37.) Under section 1237.2, before an appeal may be taken *solely* on the ground of an error "in the imposition or calculation" of fines or fees, the defendant must first raise the error in the trial court, or if the error is not discovered until after sentencing, the defendant must move the court to correct the error before taking an appeal based on the error. (*Id*. at pp. 37-38.)[4]

"Conversely, if issues *other* than the imposition or calculation of such fines, assessments, and fees are being appealed, such as in the instant case, the limited exception provided by section 1237.2 . . . no longer applies. In this situation, a defendant must seek relief in the Court of Appeal for any issue regarding the imposition or calculation of fines, assessments, and fees, including, if necessary, by requesting leave to file a supplemental brief. (See Cal. Rules of Court, rule 8.200(a)(4).) The Court of Appeal then decides all the issues of the case, preventing piecemeal litigation in separate forums. [Citation.]" (*Jenkins*, *supra*, 40 Cal.App.5th at p. 38.) As *Jenkins* further explained, in enacting section 1237.2, the Legislature intended to eliminate unnecessary

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[4] By its plain terms, section 1237.2 broadly applies to errors " 'in the imposition or calculation' " of fines, penalty assessments, surcharges, fees, or costs. (*People v. Alexander* (2016) 6 Cal.App.5th 798, 801.)

appeals that *solely* challenge the erroneous imposition or calculation of fines, assessments, and fees—by mandating a procedure allowing such errors to be corrected in the trial court. (*Jenkins*, at pp. 38-39.)

Here, section 1237.2 *did not* apply. At the time defendant's *Dueñas* motion was filed in February 2019, defendant's appeal in *Garcia II*, from his August 23, 2018 judgment of conviction and sentence, was pending, and the sole issue in *Garcia II* was *not* the imposition or calculation of fines, assessments, or fees. (§ 1237.2.) Rather, in *Garcia II*, defendant's appointed counsel filed a *Wende* brief, identifying as the only potentially arguable issue whether the trial court erroneously exercised its discretion on remand, following *Garcia I*, by imposing but staying the one-year term on defendant's personal use enhancement. (*Garcia II*, at *2.) Defendant also filed his own supplemental brief in *Garcia II*, challenging the August 23, 2018 judgment of conviction. (*Ibid*.)

Thus, after the *Dueñas* decision was issued in January 2019, defendant's only appellate recourse for challenging the fees and fines, which are part of his August 23, 2018 judgment of conviction and sentence, was to seek leave to file a supplemental brief in his pending appeal in *Garcia II*, asking this court to strike the fees and fines or remand the matter for an ability to pay hearing on them. This would have avoided adjudicating the fees and fines through "piecemeal litigation in separate forums," a result which section 1237.2 was specifically intended to prevent. (*Jenkins*, *supra*, 40 Cal.App.5th at pp. 38-39.) But defendant did not do that, and his claim of *Dueñas* error is not cognizable in this appeal from the March 6, 2019 trial court order denying his *Dueñas* motion. Defendant's claim of *Dueñas* error constitutes an impermissible collateral attack on his

now-final judgment of conviction and sentence. (*People v. Barlow* (1980) 103 Cal.App.3d 351, 360-364.)

B. *Defendant is Not Entitled to Have his Two Prison Priors, and Their Associated One-Year Terms, Stricken from His Now-final August 23, 2018 Judgment*

Senate Bill No. 136 (Reg. Sess. 2018-2019) amended Penal Code section 667.5, effective January 1, 2020, to provide that the one-year sentencing enhancement for a prison prior only applies if the underlying prison term was served for a sexually violent offense defined in subdivision (b) of section 6600 of the Welfare and Institutions Code. (See *People v. Lopez* (2019) 42 Cal.App.5th 337, 340-341.) Neither of defendant's two prison priors are based on such a sexually violent offense.

Senate Bill No. 136 only applies retroactively to criminal defendants whose judgments of conviction and sentence were not final on appeal when the legislation became effective on January 1, 2020. (*People v. Lopez, supra*, 42 Cal.App.5th at pp. 341-342; see *In re Estrada* (1965) 63 Cal.2d 740, 744-745 (*Estrada*) [amendatory act imposing lighter punishment can only be retroactively and constitutionally applied to a defendant whose "judgment of conviction" is not final when the legislation went into effect]; *People v. McKenzie* (2020) 9 Cal.5th 40, 46 [as used in *Estrada*, the phrase, " 'judgment of conviction' " means judgment of conviction *and* sentence].)

A judgment is final when the time for petitioning the United States Supreme Court for a writ of certiorari has expired. (*People v. Vieira* (2005) 35 Cal.4th 264, 306; *People v. Johnson* (2019) 32 Cal.App.5th 938, 942.) Defendant's August 23, 2018 judgment of conviction and sentence, which includes the challenged fees and fines, was final on

October 23, 2019—90 days after the California Supreme Court denied defendant's petition for review in *Garcia II*, on July 24, 2019. (U.S. Supreme Ct. Rules, rule 13.1 ["A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review."].)

In a supplemental brief, defendant claims he is entitled to the benefits of Senate Bill No. 136, because *this appeal* is not final and was not final on January 1, 2020. But this appeal is from the March 6, 2019 order denying defendant's *Dueñas* motion. Defendant's August 23, 2018 judgment conviction and sentence, which includes the two consecutive one-year terms for his two prison priors, was final on October 23, 2019, before Senate Bill No. 136 went into effect on January 1, 2020. Thus, defendant is not entitled to the benefits of Senate Bill No. 136.

IV. DISPOSITION

The March 6, 2019 order denying defendant's *Dueñas* motion, on the ground the court did not have jurisdiction to consider the motion (§ 1237.2), is affirmed.

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FIELDS
J.

We concur:

MILLER
Acting P. J.

CODRINGTON
J.